

Analysis of the Department of Labor's "PERM" Rule Overhauling the Permanent Labor Certification Process

Employers wishing to petition for an employee to be granted permanent resident status on the basis of a job offer in the United States must obtain a certification from the Department of Labor (DOL) that there are no U.S. workers qualified and available for the position and that the employment of a foreign national will not adversely affect U.S. workers. Since 1977, DOL has issued such "labor certifications" only after detailed review of documentation submitted by employers, requiring employers to either conduct a recruitment campaign under its supervision (the "traditional method") or to document unsuccessful recruitment efforts within the six months before the application was filed (the "reduction in recruitment" or "RIR" method).

The new system, known as the Program Electronic Review Management (PERM) system, will take effect on March 28, 2005. All labor certification applications for full-time permanent positions filed on or after that date must comply with these regulations.

Program Overview

PERM builds on the RIR method of obtaining labor certifications, in that its basic method is reliance on recruitment conducted by the employer prior to submission of the application. PERM's most significant difference from the current system, however, is that employers will no longer submit documentation of their recruitment efforts to DOL. Rather, they will submit an application electronically or by mail to DOL in which they attest that they have taken certain steps to recruit U.S. workers and that they have been unable to locate a qualified U.S. worker for the position. Employers will be responsible for documenting their compliance with those recruitment steps, but they will only submit that documentation to the DOL in response to an audit of their application.

The program also centralizes processing of labor certification applications at two national processing centers, one in Atlanta and one in Chicago. Previously, labor certification applications were filed locally with State Workforce Agencies (SWAs), the state-level organizations responsible for unemployment insurance, job training and placement of workers. Under the PERM program, applications will no longer be submitted to SWAs for processing, though SWAs will continue to provide determinations of the prevailing wages for occupations through their Labor Market Information (LMI) units.

DOL has not indicated publicly what percentage of applications it will select for audit, nor what criteria it will use in selecting applications for audit. In supplemental information to the new regulation, DOL does indicate that factors such as their familiarity with labor market conditions

in the location of employment; the occupation involved in the application; and the identity and characteristics of the employer would be factors in selecting applications for audit.

Through electronic filing and the audit-based adjudication process, DOL expects that applications will take 45 to 60 days to adjudicate except for those cases selected for audit. It remains to be seen whether this processing time will be maintained once the system actually goes into effect. If the application is not approved on the basis of the initial submission, we expect that processing times for audited applications will exceed the 60-day estimate, most likely taking many months to be decided.

Pre-Filing Recruitment

Under the current Department of Labor procedures, there were significant regional variations with regard to what recruitment steps were expected for an application filed with the RIR method, and the period of time during which those recruitment steps were required to be conducted. In some regions, many jobs were not considered suitable for RIR processing. In other regions, multiple advertisements over a four- or six-month period were required to qualify an application for RIR processing. One of the most significant goals of PERM is to make nationally uniform the requirements for the recruitment steps an employer must take prior to filing an application for labor certification, and to require every application to undergo pre-filing recruitment.

Advertisements

Under the new program, prior to filing any application for labor certification, an employer must place two advertisements on two different Sundays in a newspaper of general circulation in the area of intended employment. For higher-level positions requiring experience and an advanced degree, the employer may use an advertisement in a professional journal in place of one of the Sunday ads. Both ads must have been placed more than 30 days, but not more than 180 days, before filing, and may be placed on consecutive Sundays. The ad must list the name of the employer, the geographic area of employment (only if the job site is unclear, e.g., if applicants respond to a location other than the job site or if the employer has multiple job sites), and a description of the position specific enough to apprise U.S. workers of the job opportunity. The employer may include minimum education and experience requirements or specific job duties in the ad as long as those requirements also appear on Application for Permanent Employment Certification, Form 9089. The ad must direct applicants to send resumes or report to the employer, as appropriate. The employer's physical address is not required. A central office or post office box may be designated for receipt of resumes. The ad need not include the salary or a detailed listing of the job description and requirements. However, if the ad does include the salary, the salary stated must meet or exceed the prevailing wage, as determined by the SWA.

State Workforce Agency Job Order

While advertising, the employer must place a job order with its local SWA for the position. The job order should contain the same information as the advertisement, and the employer should request that the SWA refer any potentially qualified applicants directly to the employer. While

such a job order was recommended in many regions as part of an RIR labor certification application, it will now be mandatory for all applications.

Three Additional Recruitment Steps for Professional Jobs

For "professional" jobs (those for which the attainment of a bachelor's or higher degree is a usual education requirement), an employer must both advertise the opening and carry out three additional recruitment steps, choosing from the following options: (1) attendance at job fairs; (2) advertisement of the position on the employer's website; (3) advertisement of the position on a job search website other than employer's, including an ad on a newspaper's web site in conjunction with a print ad; (4) participation in on-campus recruiting; (5) placing a notice in a newsletter or publication of a trade or professional organization; (6) retaining private employment firms; (7) including the position in an employee referral program, if it includes identifiable incentives; (8) placing a notice of the job opening at a campus placement office, if the job requires a degree but no experience; (9) advertisement in local and ethnic newspapers, to the extent they are appropriate for the job opportunity; and (10) placing radio and television advertisements.

The employer must conduct three separate recruitment steps; i.e., may not conduct one of the three steps three times. With respect to these additional steps, an employer may advertise either for the specific job opportunity, or merely for the occupation involved in the application. All three recruitment steps must have taken place no more than 180 days before filing, but only one of the steps may have taken place within 30 days of filing. The employer must specify the dates of each of the three additional recruitment steps it has undertaken on the application form, and maintain documentation of the recruitment step, such as a dated printout from a website, or a flyer announcing the employer's participation in a job fair.

Posting a Notice of Job Opportunity

As under the current program, under PERM an employer must post a Notice of Job Opportunity in conjunction with the outside recruitment for the position. The notice must be posted for a period of ten business days, and the notice period may be no more than 180 days before filing and no less than 30 days before filing. The Notice is posted at a location such as an employee notification bulletin board in an area accessible to all of the employer's employees. The Notice must contain the salary for the position, but may contain a salary range so long as the lower level of the range meets or exceeds the prevailing wage. The notice may contain the same description of the position as is placed in the newspaper advertisement, and should include a contact person for employees who wish to apply for the position. In addition, the notice must contain language indicating that the posting is in connection with an application for labor certification, and that any person having information bearing on the application can submit that information to the Department of Labor.

In addition to printed posted notice, an employer must now place the notice in any and all in-house media, whether electronic or printed, in accordance with normal procedures used for recruitment for similar positions in the organization. For example, if an employer normally lists position openings on an internal web site or weekly all-employees email, the Notice of Job

Opportunity must also be placed on that web site or in that email. The notification must include all information posted in print, including salary range and DOL contact information. Since the notification in such media need only be done if it is the employer's normal practice to do so for the job classification in issue in the application, an employer could avoid listing executive-level positions if it is not normal practice to do so. Duration of the in-house media notification should be as long as other comparable positions are posted.

Recruitment Documentation And Audits

The employer must prepare documentation of all of its recruitment steps, such as newspaper tearsheets for advertisements and printouts of web sites. The employer should maintain copies of all resumes or applications submitted in connection with the recruitment steps. In addition, the employer must prepare a recruitment report that describes the recruitment steps taken and the results. This report shall include the number of hires and the number of U.S. workers rejected, categorized by the lawful job-related reasons for rejection. Although it does not need to include the identity of the individual U.S. workers who applied for the job opportunity, it must track them sufficiently that an auditor can determine which resumes were evaluated for each job opportunity. The employer must sign the recruitment report and retain it as part of the supporting documentation.

If an application is selected for audit, the employer will be required to provide the supporting documentation within 30 days of a request by a Certifying Officer. If the Certifying Officer is not satisfied that the documentation establishes unavailability of U.S. workers, the CO may require supervised recruitment after the filing. The supervised recruitment will involve a new newspaper advertisement and job order, this one directing responses to the CO, and the employer will be expected to give an applicant-by-applicant evaluation of whether the applicants met the qualifications for the position. If an employer fails to respond to a request for documentation, or is deemed to have misrepresented the recruitment steps it took or its reasons for rejecting U.S. workers, the CO may require the employer to use supervised recruitment for all of its applications for a period of up to two years.

The employer must retain its recruitment documentation for five (5) years from the date of filing of the application, as the DOL may reopen its labor certification determination even after approval and conduct an audit.

Substantive Issues – Bona Fide Job Requirements

In addition to the procedural changes noted above, DOL used the PERM rulemaking to codify some rules about what qualifications would be considered bona fide and which would not be allowed, and to make some change in those rules. These rules involve when an employer can use qualifications in excess of what the DOL considers to be "normal" qualifications for the position; when an employer can require experience that the foreign national gained with the sponsoring employer as an employee or contractor; when an employer may use "alternative" requirements for a position so that the foreign national employee will be considered qualified for the position; and when the CO can overrule the employer's determination that a U.S. worker applicant is not "qualified," because the applicant has alternate experience or education that

would make the applicant qualified, or the applicant could become qualified with a reasonable period of on-the-job training.

With respect to the issue of what job qualifications will be considered "normal," DOL incorporated the concept of "business necessity" into the PERM regulations. DOL will generally not allow use of job requirements that exceed the requirements for a position as found in the DOL's description of the occupation in its Standard Occupational Classification (SOC) system. The exception will be for requirements that the employer can justify as reasonably related to the position and necessary to perform the job duties in the context of the employer's operation. This ability to deviate from the SOC system will be important, as that system categorizes jobs into far fewer categories than the Dictionary of Occupational Titles currently uses to measure "normal" requirements.

The PERM rule will allow employers to continue to use experience gained by a foreign national with the petitioning employer (as an employee or contractor), but only where the experience was gained in a position that was not "substantially comparable" to the position involved in the labor certification. The regulations contain a new bright-line test that depends not on the employer's organizational chart or salary levels for the previous positions, but only on a comparison of the job duties of the two positions. Under this test, a prior position will be considered "substantially comparable" if at least 50% of the duties of the two positions are the same. For example, if a software engineer who spends 100% of her time implementing software is promoted to a team leader position in which she spends 20% of her time managing and 80% of her time implementing software, the two positions are "substantially comparable" and her experience as a software engineer cannot be used to qualify her for the position of team leader (of course, her experience prior to joining the employer as a software engineer could be used, if it was enough to qualify her as a team leader).

The PERM rule will also require that any alternative means for a worker to be considered qualified must be "substantially equivalent" to the primary means of being considered qualified. For example, if the labor certification application involves a household cook position, it would be reasonable to require one year of experience as a household cook or, alternatively, one year of experience as a restaurant cook, as the two periods of cooking experience are comparable. It would not be reasonable to require one year as a cook or, alternatively, one year of experience as a "household worker with some cooking duties" as the alternative requirement is less stringent than the primary requirement.

Finally, and perhaps most significantly, the new regulations allow a CO to substitute his or her judgment for an employer's and determine that an applicant who does not meet the employer's stated requirements was, nonetheless, qualified for the position by a combination of experience and education, or could become qualified through a reasonable period of on the job training. Whether or not the COs will make such determinations on a regular basis will remain to be seen. However, employers may face a significant hurdle if a CO without a technical understanding of the position begins to second-guess employers' determinations that applicants are not qualified.

Options for Pending Cases

Pending labor certification cases and new cases filed prior to March 28, 2005 will continue to be processed under the current system, if the employer wishes. However, a pending case can be converted to a PERM case, while preserving the original filing date, by withdrawing the pending case and refiling it. A case may be withdrawn and refiled if it is an RIR application, or if it is a "traditional" application for which supervised recruitment has not yet begun. In order to be refiled, the application must be for the "identical job opportunity," and must otherwise comply with all of the PERM requirements. In order to refile, therefore, an employer would need to have conducted recruitment that meets the PERM standards no more than 180 days prior to the request for conversion. Given the expense of newspaper advertising alone, many employers will opt to leave their RIR cases pending with DOL rather than converting them to PERM, unless the recruitment was conducted after October 1, 2004.

For applications not yet filed, employers may wish to conduct all PERM recruitment steps, and then either submit the application as an RIR application prior to March 28 or wait and submit the application under PERM. If the employer opts for RIR filing, it would still have the option to refile under PERM on the basis of the same recruitment if program experience in the first few months of the PERM system indicates that the new system would work well for the application. Alternatively, and particularly as the March 28 deadline gets closer, employers may wish to file traditional applications without recruitment, and so have the benefit of either converting the application or waiting to do supervised recruitment. This latter option may be very attractive for applications which rely on the current legal standard for using experience gained in different positions with the sponsoring employer, which is less restrictive than the standard under PERM.

Conclusion

When the PERM regulation was first proposed, it would have represented a significant departure from the current labor certification process and strongly limited employers' ability to use their actual job requirements as part of the labor certification process. Fortunately, the final rule appears to be more balanced in its treatment of job requirements than the proposed rule, and the additional recruitment steps will not be as burdensome as some had feared. As with any new system, its actual operation will need to be evaluated to see whether it will fulfill its promise of quicker adjudication of applications on behalf of foreign nationals to fill positions for which no U.S. workers are available.